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No. 83-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURIEL SIEBERT, SIEBERT FOR SENATE, WHITNEY NORTH SEYMOUR, JR., and SEYMOUR SENATE CAMPAIGN COMMITTEE,

Petitioners,

vs.

THE CONSERVATIVE PARTY OF NEW YORK STATE, NEW YORK STATE CONSERVATIVE PARTY STATE COMMITTEE, J. DANIEL MAHONEY, MICHAEL R. LONG, SERPHIM E. MALTESE, and JAMES E. O'DOHERTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 15, 1984

QUESTION PRESENTED

This case presents an important question concerning the proper interpretation of Title 39, United States Code, Section 3624(e) which has not been, but should be, settled by this court:

Whether a private cause of action under Section 3626(e) should be implied to permit petitioners to seek an injunction against clear violations of the postal laws of the United States which give to one candidate the unfair advantage of an unlawful federal subsidy through reduced postal rates, and if unchecked will give splinter party candidates in future elections a privileged position contrary to the principle of governmental non-intervention in the electoral process.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Muriel Siebert, Siebert for Senate, Whitney North Seymour, Jr., and Seymour Senate Campaign Committee respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 21, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Southern District of New York is reported at 565 F.Supp. 56.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 21, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiciton is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3624(e) of Title 39, United States Code, provides as follows:

39 U.S.C. § 3626(e)

> (e)(1) In the administration of this section, the rates for third-class mail matter mailed by a qualified political committee shall be the rates currently in effect under former section 4452 of this title for third-class mail matter mailed by a qualified non-profit organization.

(2) For purposes of this subsection

(A) the term "qualified political committee" means a national or State Committee or a political party, the Republican and Democratic Senatorial Campaign Committees, the Democratic National Congressional Committee, and the National Republican Congressional Committee;

(B) the term "national committee" means the organization, which by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the national level; and

(C) the term "State committee" means that organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level.

STATEMENT OF THE CASE

This action has been brought by two unsuccessful candidates for the 1982 Republican nomination for the United States Senate from New York. The defendants are the New York State Conservative Party and its key officers. The case is based on a last-minute "hate mail" campaign conducted on behalf of the successful third candidate in the Republican Party primary, who was also the candidate of the respondent Conservative Party. The mailing piece which is the subject of this action was sent to a list of approximately half a million Republican primary voters a few days before the primary election. It attacked petitioners as "left-leaning;" charged that one petitioner was an admitted " 'raving liveral' on social issues," and asserted that the other had "opposed stiffer penalties for murderers, rapists and other violent criminals."

The mailing piece was sent out at a reduced non-profit rate established for "qualified" political committees under 39 U.S.C. § 3626(e). By statute and regulation this rate is not directly available to individual primary candidates or their committees.

The average cost of 4¢ per piece under the reduced rate contrasts to 20¢ for first class mail, and in this instance represented an unlawful Federal subsidy to the winning candidate's primary campaign of approximately $80,000. Although the offending mailing was published and mailed in the name of the State Committee of the New York State Conservative Party, it is conceded that the cost of the actual mailing was paid for by the successful candidate's campaign committee. (A-26) The Conservative Party itself could not have paid the postage because of the $5,000 contribution limitation under the Federal Election Campaign Act,

When the Postal Service declined to take action to halt the mailing, petitioners brought this proceeding seeking an injunction against future unlawful mailings by defendants.*

The District Court held that the postal statutes, and specifically 39 U.S.C. § 3626(e) did not give rise to a private right of action, and dismissed the complaint for want of subject matter jurisdiciton. The Court of Appeals affirmed without dissent.

REASONS FOR GRANTING WRIT

1. THIS CASE PRESENTS AN ISSUE OF GROWING IMPORTANCE IN THE USE OF THE UNITED STATES MAILS; DIRECT MAIL HAS BECOME A MAJOR CAMPAIGN TOOL WHICH WILL BE OPEN TO MORE AND MORE WIDESPREAD ABUSE UNLESS SUBJECTED TO REASONABLE CONTROL

Background

The Founding Fathers envisioned an election process in which candidates would personally present themselves and their views

* Petitioners sought both money damages and injunctive relief in their complaint. The claim for damages, however, was based on a New York common law claim, over which the district court would have only pendent jurisdiction. Petitioners have consistently acknowledged that the only possible independent ground for subject matter jurisdiction is that of an implied right of action under 39 U.S.C. § 3626(e).

directly to the electorate, with free and open discussion of the issues of the day. This vision was best personified in the Lincoln-Douglas debates during the United States Senate Campaign in Illinois in 1858.

Dramatic changes have occurred in the election process in the last decade, largely as a result of new electronic and computer technology. In Congressional races covering large geographic areas and sizeable constitutencies – for Senate races, entire states -- candidates now turn to professional political consultants to "package" them for delivery to the voters via electronic media and computerized direct mail. See, generally, Larry J. Sabato, *The Rise of Political Consultants* (Basic Books, 1981).

Hand-in-hand with the increased use of technology in the election process has come an increasing need for more and more funds to pay for consultants, pollsters, creative talent, and delivery mechanisms (particularly television and direct mail).

Direct mail has been described as "The Poisoned Pen of Politics" (Sabato, *op cit supra*, Chapter heading, p.220). Political consultants openly boast about their ability to twist words to deceive the voters.

> With direct mail, I can speak with forked tongue. If I'm a Republican candidate I can make myself sound like a Democrat. If I'm a Democrat I can make myself sould like a Republican. I'm not saying a goddamn thing, but I get [the voters'] support.

(Statement by Herb Sosnick of Direct Mail Marketing of San Francisco in *Today* newspaper, Nov. 30, 1979, quoted by Sabato at p. 220).

The impact of direct mail in political campaigns is widely recognized by political experts.

> Most individuals greatly enjoy receiving mail. In a recent survey more people (63 percent) said they looked forward to the post than to any other of a laundry

> list of pleasurable activities on the daily schedule. Protestations to the contrary notwithstanding, most people even delight in the so-called "junk mail" they get, at least the political variety. One study indicates that three-fourths of the individuals who are sent a piece of political direct mail actually do read it.
>
> It is this sort of statistic that has made political direct mail one of the most valuable of the new campaign techniques, while remaining the least understood. Direct mail combines sophisticated political judgments and psychological, emotional appeals with the most advanced computer and mailing technologies. Used for two very distinct purposes (persuasion and fund raising), direct mail is considered a necessity by many candidates – a significant majority, in fact, now employ it in some form... (Sabato, *op. cit. supra*, pp.220-221).

A large part of the success of direct mail in political campaigns is due to the availability of computer technology to store, sort, retrieve, and print mailing labels for prospect names. (Sabato, p. 224). That particular factor is one of the subjects of the complaint in this action, which alleges that the direct mail scheme here depended on the availability of computerized labels whose economic value exceeded allowable campaign contribution limits.

The most serious aspect of the direct mail phenomenon is that it permits (nay, encourages) copywriters to twist words, well knowing that the opposition will never have a chance to respond, especially if the mailing is (as here) to be sent out in the final days of the campaign.

> Direct mail is often nothing more than mass-produced and lovingly refined hate mail. It is the standard industry practice to exaggerate broadly, just on or over the edge of lying. One direct mailer drew the fine lines of his profession's ethics: "I wouldn't quote somebody *completely* out of context; I wouldn't write something

> that was *blatantly* untrue." Direct mail is thus the conveyor of misinformation and the purveyor of oversimplification and superheated emotionalism, all of which are notoriously destructive to rational political decision making and a civilized political process. (Sabato, p. 329)

Evasion of Campaign Spending Limitations

The Conservative Party's successful use of the federal postal subsidy in this case to underwrite a major mailing in support of their candidate was the capstone of a skillfully planned and executed evasion of campaign finance restrictions. That plan depended on two parallel strategies:

1. Arranging access to the postal subsidy for their candidate without violating the contribution limits of the Federal Election Campaign Act.

2. Providing a special computerized list of Republican primary voters to the candidate's committee without violating "in kind" contribution limits.

Section 441a(a)(2)(A) of the Federal Elections Campaign Finance Act restricts multicandidate political committees' expenditures on behalf of a candidate to a maximum of $5,000. This limitation expressly includes contributions of "anything of value" (2 U.S.C. 431(8)(A)(i)). — so-called "in kind" contributions.

Once the Conservative Party set out to help its candidate win the Republican primary for the U.S. Senate through a direct mail operation, the first question it had to face was how to get the advantage of the subsidized postal rate under 3696(e) without violating the FECA spending limitations. The solution was to have the candidate's committee pick up all costs over $5,000. The Conservative Party accordingly limited its direct cash expenditure to $4,980, applied to the cost of printing the mailing piece, just under the legal limit. (A-26).

If the Conservative Party had paid the postage costs for the mailing, as contemplated by the postal statute, it would clearly have violated the contribution limits of the Federal election law. The estimated cost of $20,000 for half-a-million mailing pieces at 4¢ apiece far exceeded the $5,000 maximum amount permitted by law.

Similarly, the Conservative Party had to avoid any connection with the transfer of the computer-generated mailing labels, as this would have constituted an "in kind" contribution far in excess of Federal spending limits. (At the standard commercial rate for computer mailing labels of $40-$50 per thousand, 500,000 labels were equal to an in kind contribution of $20,000-$25,000.)

The position the Conservative Party has taken in this case is that the party and its officials "Do not know" the source of the mailing labels used in the mailing sent out in their name. (Sworn answers to interrogatories: A-27.)*

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* By way of additional background, the Court may wish to take judicial notice of the following items of public record:

(a) On September 7, 1982, the ITHACA [N.Y.] JOURNAL published a Gannett News Service story concerning statements by Michael Long (a Conservative Party official and one of the representatives here):

> There is no money for TV or radio, and the Sullivan campaign is banking heavily on a statewide mailing to likely primary voters. "No senate candidate running against Florence Sullivan has the list we do," declared Sullivan's campaign manager, Michael Long.
>
> Long also is the Brooklyn chairman of the Conservative Party *which is providing that list*. Sullivan is the Senate nominee of the Conservative and Right to Life parties, and plans to actively remain in the race even if she loses the Republican nomination. (Emphasis added.)

Mr. Long is one of those who has claimed under oath in this case that he does not know the source of the mailing list used on the Sullivan mailing. (A-27).

(b) The public copy of the campaign finance report filed by the Sullivan for Senate Committee gives the source of the computerized mailing labels of New York Republican primary voters to be the "Citizens for the Republic" of Santa Monica, California and ascribes a nominal valuation of $3,368.86 for the entire lot – about $6.70 per thousand. (FEC file 5S 3185 NY REP C1522).

* * *

These items are obvious subjects for discovery and development if the case is permitted to go to trial.

The issue before this Court, therefore, is not merely how to prevent future misuse of the Federal postal subsidy to aid individual political candidates, but how to prevent such misuse as part of a larger strategy to evade campaign spending limits.

This case presents a rare opportunity to place reasonable restraints on the abuse of Federal mailing privileges by giving political opponents the opportunity to blow the whistle when the rules are violated.

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S POSITION IN CORT V. ASH.

This Court has long recognized that private rights of action do not require express statutory authorization, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916); *Tunstall v. Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944), and that the preferred approach for determining whether a private right of action should be implied from a federal statute was outlined in *Cort v. Ash*, 422 U.S. 66, 78 (1975). See *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In this case, the District Court dismissed petitioner's complaint without referring to the *Cort* test, or even citing the decision. Moreover, the Court of Appeals affirmed the dismissal of the complaint without adequately conducting the analysis *Cort* requires. Proper application of the factors outlined in *Cort* clearly indicates that § 3626(e) creates a private right of action.

In *Cort v. Ash*, four factors were thought to be relevant to the determination of "whether Congress intended to create the private right of action." *Touche Ross & Co., v. Redington*, 442 U.S. 560, 568 (1979).

> First, is the plaintiff 'one of the class for whose *especial* benefit the statutue was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied) — that is, does the statute create a federal right

> in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g. National Railroad Passenger Corp. v. Naitonal Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler*, 373 U.S. 674, 652 (1963); cf. *J.I. Case Co. v. Borak* 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents* 403 U.S. 388,394-395 (1971); *id.*, at 400 (Harlan, J. concurring in judgment). 422 U.S., at 78.*

In determining whether petitioners can assert a private right of action under Section 3626(e), "The threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which plaintiff is a member." *Cannon v. University of Chicago, supra*, at 689. Both the District Court and the Court of appeals answered this question in the negative. For instance, the Court of Appeals stated, "The only beneficiaries of Section 3626(e) are political committees of a party. Appellants are individual candidates outside the scope of the statute." (Slip Opinion at 7).

This conclusion failed to take into account the overall statutory structure of the Postal Service Law, which defines a broader benefitted class under the *Cort* test than does the narrow exception contained in Section 3626(e).

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* Postal matters are, of course, exclusively a federal concern. Therefore, the fourth aspect of the *Cort* test is not relevant here.

The opening section of the Postal Service Law contains the following declarations of Postal Policy: (39 U.S.C. § 101(d)):

> (a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.
>
> • • •
>
> (d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

Petitioners are plainly part of the class of "users of the mail" entitled to an apportionment of costs "on a fair and equitable basis." By creating a special subsidy for a particular group, Section 3626(e) necessarily affects the class of general mail users to which petitioners belong. They are required to pay full postal rates, while "qualified" political committees receive the competitive benefit of a lower rate. Petitioners' interest in insuring that only qualified users receive that advantage is self-evident.

If the mailing procedure employed here is permitted to continue — as it will if there is no private remedy to stop it — then the declared Congressional policy of apportioning costs of postal operations on a fair and equitable basis will be defeated. Primary candidates to Republican or Democratic nomination to statewide office who receive third party nominations (Conservative, Liberal or Right to Life parties in New York State) will

have the unfair advantage of sending out mass mailings at subsidized non-profit rates, while their opponents must pay the full postage.

Whatever else it may have been up to, Congress can hardly be ascribed the intention of creating such unequal protection of the laws when it enacted § 3626(e), and to have not provided an effective remedy to prevent such a result from happening.

The unfair grant of a postal subsidy to non-profit competitors has been squarely recognized as grounds for standing to sue in *Common Cause v. Bolger*, 512 F.Supp. 26, 31 (D.C. 1980).

> In addition, Common Cause alleges that it spent more than $900,000 on mailing costs in 1973, largely for the purposes of promoting the objectives of the organization: making government more responsive through reform of political process. The injury to Common Cause and its members consists in the grant of what they allege is an illegal mail subsidy to competitors, a form of injury that has traditionally sufficed to confer standing.

Because petitioners' claims were brought on behalf of members of the class the postal laws were designed to benefit, the first prong of the *Cort* test was satisfied in this case, contrary to the decisions below.

The second inquiry under the *Cort* approach is whether there is evidence of an express or implicit legislative intent to negate the claimed private right of action. As this Court noted in *Cannon*:

> "[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling' *Cort*, 422 U.S., at 82 (emphasis in original)." 441 U.S. at 694.

The Court of Appeals, however, referred with approval to the District Court's view that silence "on the question whether a private party may sue another for the improper use of a reduced mailing rate," was determinative. (Slip Opinion, A-8). But, as this Court's opinions in *Cort* and *Cannon* make clear, the "legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cort v. Ash, supra*, 422 U.S. at 82.

More significant than the unilluminating legislative history in discerning Congress' intent in this regard is the fact that when Congress enacted Section 3626(e) in 1978, various federal courts, including the Seventh and Third Circuits, had already held that political candidates running against incumbents had standing to challenge abuses of the postal laws. *See, e.g., Schiaffo v. Helstoski*, 492 F.2d 413, 419-27 (3rd Cir. 1974); *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972), *cert denied*, 412 U.S. 953 (1973); *Belaudin v. Murphy*, 364 F.Supp. 1223, 1224 (S.D.N.Y. 1972); *Rising v. Brown*, 313 F.Supp. 824, 826 (C.D. Cal. 1970); *Straus v. Gilbert*, 293 F.Supp. 214 (S.D.N.Y. 1968).

These decisions, which approve challenges by political candidates to abuses of the postal laws, were "part of the 'contemporary legal context' in which Congress legislated" *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982); *Herman & Maclean v Huddleston*, 103 S.Ct. 683, 689 (1983); *Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1978), when it enacted Section 3626(e) in 1978. *Cannon, Curran* and *Huddleston* stand for the proposition that, when Congress reconsiders a statute in respect of which private standing to sue has been given judicial approval, then such private standing will be deemed to be within the intention of Congress unless Congress expressly withdraws it.

In other words, when Congress granted preferential postal rates to certain political committees in 1978, courts had already granted candidates standing to attack abuses of free postal rates. In these circumstances, the teaching of *Curran, Huddleston* and *Cannon* is that Congress will be deemed to have contemplated that courts would grant candidates standing to attack abuses

of the preferential rates just as they did to attack abuses of free rates.

Although this argument was made to the Court of Appeals below, the Court misconstrued the argument, characterizing it as a contention that "the law must be frozen in time for purposes of determining whether Congress intended an implied right of action to exist." (Slip Opinion at 6).

Properly analyzed, it is clear that the intent of Congress was not to foreclose private actions under Section 3626(e), but to permit them.

The third portion of the *Cort* standard requires consideration of whether an implied right of action is consistent with the legislative scheme underlying the statute. The courts below resolved this prong of the *Cort* test against petitioners solely because of their conclusion that Congress intended the postal statutes to be "enforced by the Postal Service and not by private citizens." (Slip Opinion at 8).

By assuming from the existence of the Postal Service's statutory enforcement powers a Congressional intent that those enforcement powers be exclusive, the courts below failed acknowledge that this Court rejected this approach in *Cort v. Ash*, 422 U.S. at 82-83, n.14, at least in the absence of specific support in legislative history for the proposition that express statutory remedies are to be exclusive.

It is clear from the undisputed facts of this case that implication of a private right of action would be not only consistent with the legislative goal of conferring the non-profit postal rate solely upon "qualified political committees," but also that private action is essential to enforcement of the statute. It is undisputed in this case that the Postal Service has abdicated responsibility for enforcement of the statute. (A-41). While the public as a whole suffers from the abuse of the political process which occurred in this case, only candidates such as petitioners have the incentive to do something about it.

In sum, the Court of Appeals erroneously applied the *Cort v. Ash* test, and that error requires correction.

Practical Considerations

The Court of Appeals disregarded the common-sense aspects of its analysis: The Postal Service has neither the resources nor the appetite for enforcement of 3626(e).

As soon as petitioners became aware of the Sullivan mailing in the closing days of the campaign, one went directly to the appropriate official at the General Post Office in New York City to try to persuade the Postal Service to halt further distribution of the mailing until the proper fee had been paid.

> On Monday morning, September 20, 1982 immediately after learning that the Sullivan mailing piece was being sent out at non-profit mailing rates under the name of the State Committee of the New York State Conservative Party Party, I went in person to the General Post Office at Eighth Avenue and 33rd Street in New York City, where I proceeded to the Mailing Requirements Section and had a conversation with the postal official in charge of Non-Profit Bulk Rate mailing requirements. I showed the official a copy of the Sullivan mailing and told him that I believed that it was not a *bona fide* mailing by the Conservative Party State Committee but instead was being mailed out on behalf of a political candidate. The postal official pointed out that the mailing showed on its face the return address of:
>
> New York State Conservative Party State Committee
> 1982 Victory Fund
> 45 E. 29th Street
> New York, NY 10016
>
> He said that the Postal Service did not inquire into the legality of non-profit permit use beyond examination of the return address printed on the mailing piece. Since the Sullivan mailing piece bore the return address of a qualified organization, he said they had no further administrative role. (A-40)

The Postal Service official also made it clear that a formal written complaint would not change the agency's position.

> I specifically asked the official if the Postal Service would stop further delivery or seek to enjoin the mailing if formal written allegations of misuse were supplied. His answer was in the negative. He said there was nothing further the Postal Service could or would do. (A-41)

In light of the decision of the Court of Appeals, Petitioners have communicated with the General Counsel of the Postal Service, requesting that official to inform this court by *amicus* brief or otherwise what the Service's position is with respect to future enforcement in case of violations of the mailing requirements. The Assistant General Counsel has advised petitioners that the Postal Service does not consider it appropriate "to interject itself into these proceedings."*

Accordingly, it is apparent that the Postal Services does not have the intent or the desire to involve itself in fights between Congressional candidates over alleged improper use of postal subsidies. What the lower courts have done in denying individual candidates the right to seek judicial redress is to block all enforcement activity and leave the field wide open to abuse.

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* Full text of letter from United States Postal Service dated March 8, 1984:

> Dear Mr. Seymour
>
> We have read with interest your letter of February 28, 1984, and the opinion of the Second Circuit Court of Appeals in the case of *Siebert v. Conservative Party*, which were forwarded to this office for consideration. We note that you have invited the United States Postal Service to submit a brief *amicus curiae*, or a letter to accompany your appeal to the Supreme Court. However, we do not consider it appropriate for the Postal Service to interject itself into these proceedings.
>
> Sincerely,
>
> Stanley F. Mires
> Assistant General Counsel
> Rate Application Division
> Office of Rate and Classification Law

3. THE DECISION BELOW IS IN CONFLICT WITH LEGAL PRINCIPLES APPLIED BY THE THIRD, SEVENTH AND NINTH CIRCUITS

In 1981, the Ninth Circuit Court of Appeals expressly upheld a private remedy to prevent misuse of another subsection of § 3626 for political purposes in *Owen v. Milligan*, 640 F.2d 1130, 1132-3 (9th Cir., 1981). In that case a defeated candidate sought cancellation of the non-profit permit of a local COPE organization because of precisely the same kind of violation as here—loaning the permit to a political candidate for use in a campaign. The plaintiff included the local postmaster as a party defendant.

The district court upheld the plaintiff's right to bring an action in the Federal Court and issued an injunction to prevent further violations of § 3626. The Court of Appeals affirmed.

> . . . Owen and the Republic Committee members seek to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which "arguably promote his electoral prospects." *Id.* The plaintiffs have a continuing interest in preventing such practices, and, thus, have standing. (640 F.2d 1133).

The assertion by the Court of Appeals that *Owen v. Milligan* is "really a suit in mandamus" (Slip Op. p.9) disregards its procedural history. That action was originally brought against the non-profit permit user. It was only the second enforcement proceeding which sought to force the Postal Service to carry out the District Court's original mandate.

The Third Circuit earlier recognized a private remedy to stop violations of the franking statute in *Schiaffo v. Helstoski*, 492 F.2d 413 (3rd Cir., 1974). The Ninth Circuit decision two years later in *Owen v. Milligan* expressly re-affirmed Schiaffo on the questions both of standing and mootness. 640 F.2d 1130, at 1133 and fn.8.

The Seventh Circuit also found subject matter jurisdiction to restrain violations of the franking statute for political campaign purposes in *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir., 1972) cert. den. 412 U.S. 1953 (1973), which was likewise cited with approval in the subsequent *Owen v. Milligan* opinion on standing.* 640 F.2d 1130, at 1133, fn.8.

The Court of Appeals decision in this case conflicts with these decisions, and this conflict confirms the fact that the question presented in this petition warrants review by this Court.

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* Four District Court cases have also held that a private party has the right to seek an injunction to prevent violations of the franking statute:

Rising v. Brown, 313 F.Supp. 824 (CD Cal., 1970) involved a suit by one Congressman to enjoin another Congressman from using his franking privilege in a primary contest in which both were seeking nomination to the U.S. Senate. The court upheld standing and granted the injunction.

Straus v. Gilbert, 293 F.Supp. 214 (SDNY, 1968) was a suit by a primary candidate to enjoin his opponent, the incumbent Congressman, from using his franking privilege to send out what he claimed was campaign literature. The district court, while concluding that the content of the material did not violate the franking statute, expressly affirmed its subject matter jurisdiction to hear the matter.

Van Hecke v. Reuss, 350 F.Supp 21 (E.D. Wisc. 1972), upheld the propriety of the franked newsletters sent out by the incumbent Congressman, while recognizing the District Court's jurisdiction to consider a complaint brought by the oppositing candidate.

In *Belardino v. Murphy*, 364 F.Supp. 1223 (SDNY, 1972), Judge Wyatt granted an injunction in favor of a Congressional candidate against his incumbent opponent to prevent further violations of the franking statute:

> The plaintiff should have a preliminary injunction on his second claim. He has standing and his injury would otherwise be irreparable. (At p.1224).

The fact that Congress has since legislated the private remedy out of existence in franking cases by providing an express alternative procedure only underscores its *failure* to prohibit private enforcement actions and provide an alternative remedy with respect to the qualified political committee nonprofit permit.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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March 15, 1984

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 309—August Term, 1983

(Argued November 7, 1983 Decided December 21, 1983)

Docket No. 83-7542

MURIEL SIEBERT, SIEBERT FOR SENATE, WHITNEY NORTH SEYMOUR, JR., and SEYMOUR SENATE CAMPAIGN COMMITTEE,

Plaintiffs-Appellants,

—v—

THE CONSERVATIVE PARTY OF NEW YORK STATE, NEW YORK STATE CONSERVATIVE PARTY STATE COMMITTEE, J. DANIEL MAHONEY, MICHAEL R. LONG, SERPHIM R. MALTESE, and JAMES E. O'DOHERTY,

Defendants-Appellees.

Before:

MCGOWAN,* TIMBERS and PIERCE,

Circuit Judges.

* Senior Judge of the United States Court of Appeals for the District of Columbia, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York in an action in which plaintiffs seek to assert an implied right of action pursuant to 39 U.S.C. § 3626(e)(Supp. V 1981). Henry F. Werker, *Judge*, granted defendants' motion to dismiss complaint for lack of subject matter jurisdiction.

Affirmed.

POWELL PIERPOINT, New York, New York (Hughes Hubbard & Reed, New York, New York, of counsel), *for Plaintiffs-Appellants.*

JOHN P. DELLERA, New York, New York (Baker, Nelson & Williams, New York, New York, of counsel), *for Defendants-Appellees.*

MCGOWAN, *Circuit Judge*:

This case concerns the availability of a private cause of action under 39 U.S.C. § 3626(e) (Supp. V 1981). Appellants, Muriel Siebert and Whitney North Seymour, Jr., were unsuccessful candidates for the 1982 Republican Party nomination for United States Senator from New York.[1] Appellees are the Conservative Party of the State of New York, its state committee and four officers thereof. Appellants sued appellees in the District Court

[1] Their respective campaign committees are also named as appellants.

alleging a variety of causes of action all related to the support the Conservative Party gave during the primary campaign for the Republican nomination to Florence M. Sullivan, the winner of the Republican nomination.[2]

This case presents only a single question for resolution by this court, namely, whether a private cause of action may be implied from the terms of 39 U.S.C. § 3626(e). We hold that it may not.

I. Background

39 U.S.C. § 3626(e)(1) extends nonprofit organization postal rates (4 cents per piece) to "qualified political committees".[3] A qualified political committee is defined

[2] The results of the primary were:

Sullivan: 216,486
Siebert: 157,446
Seymour: 136,974

Sullivan subsequently lost the general election by a substantial margin to the incumbent, Senator Daniel Patrick Moynihan.

[3] 39 U.S.C. § 3626(e) provides:

(e)(1) In the administration of this section, the rates for third-class mail matter mailed by a qualified political committee shall be the rates currently in effect under former section 4452 of this title for third-class mail matter mailed by a qualified nonprofit organization.

(2) For purposes of this subsection—

(A) the term "qualified political committee" means a national or State committee of a political party, the Republican and Democratic Senatorial Campaign Committees, the Democratic National Congressional Committee, and the National Republican Congressional Committee;

(B) the term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level; and

(C) the term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the state level.

in part as "a national or State committee of a political party". 39 U.S.C. § 3626(e)(2)(A)(Supp. V 1981). The United States Postal Service had interpreted this provision to limit the reduced rates to the Republican and Democratic Parties. This limitation, however, was declared unconstitutional. *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980). The Postal Service regulations now permit the national or state committees of *any* political party to take advantage of the special bulk mailing rates. United States Postal Service, Domestic Mail Manual ("DMM") § 623.31(1982). The campaign committees of individual candidates may not, however, use these special rates. DMM § 623.4. An organization which qualifies for the special rates may only mail its own matter at these rates. DMM § 623.51. Moreover, cooperative mailings may only be made at the special rates when each organization individually qualifies for use of the special rates. DMM § 623.52.

During the early fall of 1982, appellants and Florence Sullivan waged a hotly contested primary campaign for the Republican nomination for United States Senator from New York. The day before the primary election, appellee, the New York State Conservative Party, mailed a half million pieces of campaign literature, supporting Sullivan and attacking appellants, to a specially compiled list of Republican voters in New York State. Joint Appendix ("J.A.") at 7-8. This literature was mailed at the reduced third-class postage rate accorded to "qualified political committees" under 39 U.S.C. § 3626(e). J.A. at 14-15. The mailing conveyed the impression that it was solely attributable to the New York State Conservative Party. *Id.* Indeed, it specifically represented that it was paid for by appellee, the New York Conservative Party State Committee. In fact, appellees paid only $4,980

toward printing and mailing costs. J.A. at 26. Sullivan's campaign committee apparently paid for the remainder. *Id.* Thus, arguably, the primary eve mailing by the Conservative Party of the State of New York was ineligible for the special bulk rate provided for by 39 U.S.C. § 3626(e).

Appellants brought suit in the District Court seeking to recover their campaign expenses and to obtain an injunction which would bar appellees from using the Postal Service to support or oppose any candidate in any future Republican primary. J.A. at 11-12. The District Court dismissed the suit for lack of subject matter jurisdiction on the ground that a private citizen may not bring suit under 39 U.S.C. § 3626(e).[4] *Siebert v. Conservative Party*, 565 F.Supp. 56 (S.D.N.Y. 1983). On appeal, appellants argue that the District Court erred in application of the law of implied private causes of action.

II. Discussion

Title 39 U.S.C. § 3626(e) does not provide an express cause of action to private citizens to enforce the statute. Appellants rely on *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974), to argue that a private cause of action under Section 3626(e) should be implied because there is no other means to enforce the statute. Brief of Appellants 17. In *Schiaffo* a divided panel of the Third Circuit held that a private cause of action was available to a plaintiff under 39 U.S.C. §§ 3210-12 to enjoin a United States Representative from mailing campaign literature to voters under the Congressional frank privilege. The court reasoned that, because the Postal Service never attempted

[4] Appellants concede that this is the only possible ground for subject matter jurisdiction. J.A. at 49 n.1.

to enforce the statute, such causes of action must be permitted. Appellants argue by analogy that, because the Postal Service has never enforced 39 U.S.C. § 3626(e), a private cause of action should be allowed.

The District Court rejected this argument because the *Schiaffo* court had relied on the United States Supreme Court's decision in *J.I. Case v. Borak*, 377 U.S. 426 (1964). 565 F. Supp. at 58. Because subsequent Supreme Court decisions[5] modified *Borak*, the District Court felt that *Schiaffo* was inadequate precedent. Appellants now argue that the Supreme Court's most recent pronouncements[6] require a court to consider only the "contemporary legal context" in which Congress legislated in order to determine whether to imply a private cause of action. Brief of Appellants 9-13. Appellants urge that this means the District Court had to employ the analysis that the Supreme Court required in 1978 when Section 3626(e) was enacted. *Id.* Therefore, it is argued that because *Borak* was the governing law on implied private rights of action in 1978, the District Court erred in relying on post-*Borak* decisions. *Id.*

Appellants' argument is without merit. Appellants seize on language from the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), to contend that the law must be frozen in time for purposes of determining whether Congress intended an implied right of action to exist. *Cannon* and the other cases cited by appellants merely restate the canon of statutory construction that Congress is presumed to be

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5 *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

6 *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Herman & MacLean v. Huddleston*, ___ U.S. ___, 103 S.Ct. 683 (1983).

aware of the judicial background against which it legislates. A lower federal court, however, must employ the analysis currently required by the Supreme Court for making the determination of Congressional intent.

The Supreme Court has determined that in certain circumstances the Congressional purpose in enactment of legislation would be vitiated in the absence of private remedies. Therefore, even though a private cause of action was not expressly provided for in the legislation, such a cause of action may be implied. *See Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979); *Piper v. Chris-Craft Industries*, 430 U.S. 1, 24-25 (1977). A court must find, however, that Congress intended to create such a remedy. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court set out a four-part test for ascertaining legislative intent in this respect. First, is the plaintiff one of the class for whose special benefit the statute was enacted? Second, does the legislative history show any intention to deny private remedies? Third, would private remedies frustrate the statutory scheme? Fourth, is the subject matter of primary concern to the states? *Id.* at 80-85.

The District Court, although it did not specifically refer to the *Cort* test or cite to *Cort*, did adequately conduct the required analysis. First, the District Court examined the language of the statute and noted that it was enacted to benefit certain political committees. "Section 3626(e) does not. . .create a cause of action in favor of anyone, nor does it declare any conduct as being illegal." 565 F.Supp. at 58. This indicates that the District Court did not feel that appellants came within the class for whose protection the statute was enacted—the first part of the *Cort* test. This conclusion is unassailable. The only bene-

ficiaries of Section 3626(e) are political committees of a party. Appellants are individual candidates outside the scope of the statute.

Second, the District Court reviewed the legislative history of Section 3626(e). The court found that "it is silent on the question whether a private party may sue another for the improper use of a reduced mailing rate." *Id.* The court's conclusion in this respect is an accurate summary of the legislative history of 39 U.S.C. § 3626(e). *See* S. Rep. No. 121, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 1568, 95th Cong., 2d Sess. (1978).

Third, the District Court considered the overall scheme of the postal statutes and concluded that Congress had intended that they be enforced by the Postal Service and not by private citizens. 565 F.Supp. at 58. The court points to the statutory right of the Postal Service to sue in its official capacity, to investigate postal offenses and to pay rewards for information provided regarding violations. The District Court also noted that where Congress felt a need for private remedies under the postal laws it had expressly provided for them. *See* 39 U.S.C. § 3628(1976).

Finally, because postal matters are exclusively of federal concern, there was no need for the District Court to address the fourth part of the *Cort* test.

Appellants also argue that the District Court decision is in conflict with the Ninth Circuit's decision in *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981). Brief of Appellants 14. This argument also misses the mark. In *Owen*, a local Republican Committee sued the Seattle Postal Service to enforce its own regulations against nonprofit organizations fronting for political candidates in the use of special mail rates. The court only touched on 39 U.S.C. § 3626(e) briefly to note that its encactment did

not moot the case. The court did not find that Section 3626(e) created any private cause of action. *Id.* at 1133-34. Indeed, *Owen* is really a suit in mandamus to require the Postal Service to meet its statutory duty.

The ability to maintain a suit against the Postal Service to enforce its own regulations—which presumably extends to appellants—provides no support for the proposition, urged by appellants, that a private litigant may seek to recover damages from another private party for an allegedly improper use by the latter of 39 U.S.C. § 3626(e)(1). As recited above, and by the District Court in its opinion, there is nothing on the face of that statute, nor in the legislative history underlying it, that provides any rational basis for the implication of a private cause of action of the kind before us on this appeal.

For the reasons hereinabove appearing, the judgment of the District Court is affirmed.